United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

T. W. Jenkins & Company, a Corporation,
Plaintiff in Error,
vs.
Anaheim Sugar Company, a Corporation,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

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STATEMENT OF THE CASE.

The plaintiff in error above named has served upon us an instrument entitled "Appellant's Brief." This brief commences with what purports to be a "Statement of the Case." This statement in some respects needs supplementing, and in others needs altering, in order that the same may be made to fairly present the issues involved on this appeal. The statement is, therefore, controverted within the meaning of the court's

rule and a statement of the case will be herein set forth. For purposes of brevity, the plaintiff in error and the defendant in error will be designated hereinafter as plaintiff and defendant, respectively, they having been plaintiff and defendant in the court below.

The record discloses that a demurrer of the defendant to the second amended complaint of the plaintiff was sustained by the court below, and that, the plaintiff having refused to amend, judgment was entered in favor of the defendant. The plaintiff thereafter sued out its writ of error. The facts for consideration by the court are simply those which were well pleaded by the complaint. Among other things, it is alleged in the complaint:

That the plaintiff, an Oregon corporation, engaged in buying and selling and dealing in sugar and kindred articles, and the defendant, a California corporation, engaged in the business of manufacturing and refining sugar, entered into the following agreement, to-wit:

"(Contract subject to unforeseen acts of providence, such as fire, earthquake, flood.)

San Francisco, Calif., June 13, 1914.

"A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Company, party of the second part.

"To-wit:

"Party of first part sells and party of second part buys August requirements bags fine granulated beet sugar at $4.20 per bag less 2% cash 8 days, f. o. b. San Francisco, August shipment.

"It being understood and agreed that party of the first part guarantees the price up to time of arrival

against decline only to the basis of the C. & H. and Western Sugar Refining Co.

ANAHEIM SUGAR COMPANY.
Per ARISS, CAMPBELL & GAULT, *Agts.*
Party of 1st Part.
T. W. JENKINS & COMPANY,
Party of 2nd Part."

That the plaintiff, in conducting its business, was accustomed to contract with a producer for sugar and, thereafter, make sales thereof, and that this was known to the defendant at the time of the making of the aforementioned contract.

That after the making of said contract, to-wit, during July and August, 1914, the plaintiff took orders for 4800 bags of sugar for August, 1914, delivery.

It is also alleged that the plaintiff had required in excess of 4800 bags of sugar during the month of August for many years previous.

It is further alleged that the defendant, at the time the contract was entered into, knew what the plaintiff's requirements for sugar would be during the time of said contract.

That plaintiff ordered from the defendant during August, 1914, 4800 bags of sugar, but that the defendant refused to deliver in excess of 600 bags.

In conclusion plaintiff alleges that it bought in the open market, at the prevailing market price, 4200 bags of sugar for delivery to its customers, and that by reason of the premises, etc., it has been damaged in the sum of thirteen thousand and twenty dollars.

The demurrer which was sustained does not, as stated by counsel for plaintiff in error, merely express the "contention that the contract is unenforceable because of uncertainty and ambiguity." The demurrer will be found in the record, and speaks for itself. It alleges, disjunctively, as its grounds, in substance, that the complaint does not contain facts sufficient to constitute a cause of action; that the complaint is uncertain; that the complaint is ambiguous, and that the complaint is unintelligible.

There is, therefore, presented for the consideration of this tribunal these questions:

Does the complaint state facts sufficient to constitute a cause of action?

Is the complaint uncertain, ambiguous or unintelligible?

The determination of these questions will necessitate a consideration and determination of the questions whether the aforementioned so-called contract is void for lack of mutuality of its obligation or because of uncertainty or ambiguity, and, further, assuming its validity, whether a cause of action for its breach has been properly stated.

These questions may properly be considered under three general heads:

POINT 1. The alleged contract providing for the sale at a fixed price to a purchaser of his "August requirements" of sugar for resale by him is void for want of mutuality of obligation.

POINT 2. The alleged contract providing for the sale at a fixed price to a purchaser of his "August requirements" of sugar for resale by him is unenforceable and void because it is uncertain, ambiguous and unintelligible.

POINT 3. The complaint is uncertain, ambiguous and (or) unintelligible.

Authorities.

Crane v. Crane, 105 Fed. 869;
American Cotton Oil Co. v. Kirk (C. C. A.), 68 Fed. 791;
Tarbox v. Gotcian, 20 Minn. 139;
McIntyre etc. Co. v. Jackson Lbr. Co. (Ala.), 51 So. 767;
Hugens v. Southwest etc. Co. (Ga.), 48 S. E. 933;
Higbee v. Rust (Ill.), 103 Am. St. Rep. 204;
Walker etc. Co. v. Swift & Co., 200 Fed. 529, 43 L. R. A. (N. S.) 730;
Krause v. Greenfield (Ore.), 123 Pac. 392;
Plumb v. Hallaver, 130 N. Y. Suppl. 147, 145 App. Div. 20;
Cold Blast etc. Co. v. Kansas City etc. Co., 114 Fed. 77;
R. C. L., 6th Vol., page 647;
R. C. L., 6th Vol., page 689;
43 L. R. A. (N. S.) 730.

Argument Upon Points 1 and 2.

The question of the validity of contracts of this kind has been before the courts, both state and fed-

eral, of the United States before. This case is, therefore, not one of first impression. On the contrary, the question has been presented from so many different angles that counsel for plaintiff in error have permitted themselves to lose sight of the essentials and to confuse shadow with substance. The difficulty has arisen through the efforts of counsel, and indeed of a few courts, to apply the letter of the law as announced rather than its spirit.

Probably one of the most elementary principles of the law of executory contracts is that which requires that an agreement must be mutual in its obligation in order to constitute a contract. In the case of contracts wholly executed, this element is not needed, which is likewise true in the case of a contract wholly executed by one party, such as an option agreement whereunder the holder has paid the consideration which binds the vendor. Until, however, a contract is executed, the obligation must be mutual or it is not a contract.

Therefore, if any executory agreement is not mutually binding upon the parties thereto, it is void and unenforceable as a contract.

When the contract declared upon by the plaintiff in the case at bar is put to the test of this principle, it is found wanting, and this without reference to the question of its indefiniteness and ambiguity. The contract attempts to bind the seller to sell and deliver, at a fixed price, to the buyer, all sugar which the buyer will require for resale during August, 1914. If the amount of sugar that the plaintiff would require for

resale during August, 1914, was wholly incapable of reasonable ascertainment at the time this so-called contract was executed, the contract is void because it is too vague and indefinite to be enforceable. If, on the other hand, such amount was capable of reasonable ascertainment at the time the contract was entered into and was known, the alleged contract is void for want of mutuality because of the obvious reason that the failure or omission to stipulate this amount was entirely due to a desire and intention on the part of the plaintiff not to be bound to buy the particular, or any, amount of sugar if the price should drop or the demand therefor abate during said month.

One or the other of these alternatives was the case. There is not much choice. A brief discussion of these propositions separately might aid the court in weighing their respective merits.

Was Amount Ascertainable and Known?

We submit that it was not only not known at the time the contract was entered into, but that it was not capable of reasonably accurate ascertainment at that time. If the sugar had been intended for consumption by the plaintiff during the month of August, 1914, it might very well be said that the amount thereof was capable of reasonable ascertainment, for, in that case, the history of the past experiences of the plaintiff could be used. Its requirements for the month of August in previous years, or the monthly amount required during a short period previous to the making of the contract, or the average monthly amount needed during the preceding period of one or two years, ac-

cording to the nature of the business and the effect of the seasons and other influences upon the demand, might be the basis for the estimate. In any event the ascertainment in advance of the monthly needs would only be possible because the article needed was for *consumption* in an established business. The same is not true where the article is intended for *resale*. In that case it may or may not be needed. It is entirely immaterial what the plaintiff actually did in this case *after* the execution of this agreement. The test is not what the plaintiff *did*, but what the plaintiff *could have done* under this so-called contract. If the plaintiff could have refused to order or receive any sugar from the defendant without liability, the amount can not be said to have been ascertainable and known. This is but the converse of a statement at page 24 of the brief of plaintiff in error. It is there asserted that the defendant could have compelled the purchase of the ordinary and reasonable requirements of the plaintiff or procure damages for its failure to make such purchase. This statement necessarily is based upon the assumption that the amount of the plaintiff's needs were known at the time the contract was executed. If this amount was known, and the contract was otherwise valid and enforceable, there is, of course, no doubt that the defendant would have this right of action. We submit that the amount was not known, nor, indeed, capable of being known, at the time of the execution of the agreement, for the reason that under this agreement the plaintiff could have evaded all liability to the defendant. If, as above stated, this could be done *under any conditions,* it

would mean simply that under those conditions the requirements of the defendant would be *nil.* If this is true, how can it be said, whether by direct allegation or by argumentative averment, as in the case at bar, that the needs of the plaintiff were known at the time the contract was entered into. It is not at all difficult to illustrate. Suppose a day, or a week, or a month after the execution of this so-called contract, and before the plaintiff had obligated itself to resell any sugar for August delivery, the price had dropped or the demand for sugar had abated. This is not an unreasonable supposition. The case at bar serves as a striking illustration of the effect of international affairs upon prices. The court judicially knows that the European war commenced early in August, 1914. The complaint in this case shows that the price named in this contract, to-wit, $4.20 per bag, advanced to $7.30 per bag, an advance of almost one hundred per cent. An increased demand necessarily results in an increased price. On the other hand, an abatement or falling off in the demand, for a stronger reason, results in a lowering of the price. On June 13, 1914, the parties hereto no more expected the increased demand and inflation of price which actually came to pass within sixty days, than they expected a complete abatement of demand. Under conditions of the latter sort, the plaintiff might very well, and in good faith. not have needed or required any sugar, for the reason that its customers required none from it. Further, if any customers, although they may have been regular customers, should, under those conditions, have applied to the plaintiff for sugar at a market price less than

that which plaintiff therefore had to pay for the same under said agreement, the plaintiff, being under no contractual obligation to make such a sale at a loss, would not have done so. As very aptly said by the court below:

"To presume otherwise would be to disregard the most obvious motives of self-interest."

The reverse of this situation likewise may be relied upon to prove the same point. What was to prevent the plaintiff, during the month of August, 1914, from accepting orders for many times the volume of sugar formerly normally required by it in any one month. If it could do so, its August requirements can not be said to have been ascertainable or known in June, 1914. It is stated at page 30 of plaintiff's brief, referring to this particular matter, that

"It did not occur to Jenkins & Company to attempt any such imposition, and we may add that it did not occur to counsel for Jenkins & Company that any such imposition could be practiced on any American tribunal, Judge Bledsoe's fears notwithstanding."

There is no allegation in the complaint to this effect. The statement is, therefore, *de hors* the record. Further than that, it is testimony gratuitously given by counsel. As such it has no place in a brief. A similar offense is shown at page 22 of plaintiff's brief wherein the concluding portion of the aforementioned agreement is partially copied. The testimony there given by counsel is to the effect that the C. H. & Western Sugar Refining Company were the defendant's principal competi-

tors. This also is an inexcusable departure from the record. While ordinarily such a practice can be actuated but by one method, we hesitate to believe that the distinguished counsel for plaintiff intended thereby to attract the attention of the court to matters not properly in this record. If we were to pass the matter without comment it might possibly be inferred by the court either that we admit these assertions, or that we consider them of no importance. But we do emphatically challenge the statements, which could not have been made by counsel having knowledge of the facts. We presume, however, that the violation by counsel of the rule that matters *de hors* the record cannot be considered would not justify us in ourselves transgressing such rule by stating here the actual facts of the situation as they existed at the time, much as we would like to do so under the circumstances. We must content ourselves, therefore, with the understanding that the court will consider only such matters as are properly within the record.

Resuming our discussion of the question as to whether the contract is one under which the quantity of plaintiff's August requirements can possibly be said to have been capable of reasonably accurate ascertainment, we fail to find anything either in the contract or the complaint from which the court can determine that there was any meeting of minds at the time the contract was made, either as to any definite quantity or any method whereby the quantity could be even approximately determined.

The plaintiff will doubtless reply by quoting copiously

from its second amended complaint. The complaint in this particular was obviously drawn in contemplation that this precise point would be the basis of an attack against it. It is alleged that plaintiff would contract with a sugar producer for its requirements of sugar for a fixed period and thereafter would resell said sugar at a price based upon the contract price, and that these facts were known to plaintiff. So far, the defendant has not been charged with any knowledge which would influence the decision in this case. It is further alleged that for many years plaintiff's August requirements of sugar amounted to 4800 bags and that "relying upon the contract" which, of course, means *"after"* the execution thereof, plaintiff accepted orders for 4800 bags and agreed to deliver the same, and that plaintiff *therefore* "required in its said business * * * during the month of August, 1914, the said 4800 bags of sugar" and *that at the time said contract was entered into,* the defendant knew what plaintiff's August requirements would be.

The province of a complaint is to state the ultimate facts upon which the plaintiff's cause of action is based. A demurrer thereto admits only such of those facts as are well pleaded. Therefore, a fact which is not well pleaded is not admitted. In this case the allegation that plaintiff's August requirements were known, is not well pleaded. It is an allegation which could not possibly be proved, for the reason, as hereinbefore shown, it was, on June 13, 1914, humanly impossible to foresee the events of the succeeding sixty days and not only know what would happen, but the effect

thereof upon the demand for sugar. It necessarily results from the limitations which an all-wise providence has placed upon human capabilities, that it can not be true that the plaintiff and defendant, or either of them, in June, 1913, knew how much sugar the plaintiff would require to supply the demands of its customers in August, 1914.

It will be further observed that there is not in the complaint a direct allegation that the plaintiff and defendant knew, at the time the contract was entered into, that the plaintiff would require and need during August, 1914, 4800 sacks of sugar, and no more and no less. The allegation simply is that the plaintiff, during previous months of August, had required that amount, and that *after the contract was signed, the plaintiff went out and solicited and accepted orders for that amount* FOR AUGUST DELIVERY. The conclusion is then alleged by the plaintiff that *therefore* plaintiff's August requirements were 4800 bags. The allegations concerning defendant's knowledge is not that the defendant knew that plaintiff's August requirements would be 4800 sacks and no more and no less, or approximately that amount, but that at the time said contract was entered into the defendant knew the nature and character of plaintiff's business and the manner in which it was conducted and "what plaintiff's requirements for sugar would be" during August, 1914. This is far from having the effect of rendering certain and definite the stipulation in the contract concerning the quantity. At the time the contract was entered into the quantity of sugar the plaintiff would require during August was not humanly capable of as-

certainment. The fact that the plaintiff, during previous months of August, or at any other time, required a specified quantity is immaterial as relating to a business of resale which dependens entirely upon the condition of the market and not upon production. The fact that plaintiff, *after* the execution of the contract, actually accepted orders for a specified amount can have no possible bearing. Sight must not be lost of the fact that we must examine this matter as it stood on June 13, 1914, and not be influenced by what happened thereafter. The fact that it so happened that plaintiff did require 4800 sacks during August, 1914, is no argument that it would not have required more or less if conditions had been different, and, of course, when the contract was entered into, no powers of prognostication can be said to have been possessed by the parties to this transaction.

We submit that no reason can be advanced for the courts to commit themselves to a belief in the supernatural nor to accept as true allegations which human experience has taught can not be true. Suppose a complaint should be presented for consideration which alleges that white is black or black white, or that the law of gravity had become inoperative, would those allegations be accepted as true upon demurrer? We think not. The allegation, therefore, that the defendant in this case, on June 13, 1914, knew what the plaintiff would require in the way of sugar for resale in August, 1914, can not be true, as it necessitates a belief on the part of the court that the defendant at that time possessed supernatural powers. Therefore, this allegation must be disregarded and the case treated as

it should be treated, namely, that the plaintiff's August requirements would depend upon circumstances. Consequently, the contract is, insofar as the quantity involved therein is concerned, too vague and indefinite to be enforceable.

Was Contract Mutually Binding?

As above stated, if this amount was mutually known, there could have been only one reason why it was not stated in the contract and that reason is that the plaintiff did not desire to be bound to take that amount of sugar. Plaintiff cannot argue in this case that the exact quantity was not inserted in the contract in order to permit a reasonable elasticity in the amount of sugar which plaintiff might be able to demand thereunder. The allegation in this case is that the amount of plaintiff's August requirements was known *at the time the contract was entered into.* This means the *exact* amount. If the exact amount was known, as alleged, there would be no reason for any such elasticity as plaintiff's orders necessarily would be for the precise amount of its requirements. Therefore, there can be no other reason for the failure to stipulate the exact quantity, if such amount were actually known, as alleged, than that the plaintiff did not desire to bind itself to purchase any known or specified amount. There can be no better evidence than this, that the contract is lacking in mutuality. It is, however, not necessary to rest our case upon this argument alone. We desire to reiterate in this connection that the plaintiff's August requirements could not have been known in June, and proceeding upon that basis, we

find a contract which requires the defendant to sell to the plaintiff at a stipulated price, all sugar which the plaintiff might require in August, plaintiff's requirements being for resale. As has already been shown, the plaintiff's contract with the producer, according to its custom of doing business, always precedes its contracts with its customers. Hence, *at the time the contract involved in this case was signed, the plaintiff was under no obligations to deliver any sugar in August.* There is no showing in the complaint as to *when* it became so obligated, except that it does appear therefrom that these obligations were assumed *after* the execution of the contract between plaintiff and defendant. If, as hereinbefore stated, the demand for sugar had meanwhile diminished or abated, plaintiff's customers might not have required any sugar whatsoever during August. The period of time is very short and it is not unreasonable to assume that conditions might have become so acute that rather than buy sugar upon a falling market, plaintiff's customers would have bided their time for the purpose of determining what might happen. Plaintiff's customers were purchasers of sugar "at wholesale" "in bag lots." *They were not consumers.* It is, therefore, entirely possible that conditions might have arisen which would have rendered it impossible for plaintiff to have sold any sugar even had it so desired. In this connection it may be stated that the concluding paragraph of the contract does not change the situation for the reason that it only protects the plaintiff against decline to the price charged by the C. H. & Western Sugar Refining Company. This protective guarantee does not in any wise guarantee that

there will be a demand for sugar. In the absence of any demand, the plaintiff would make no sales and, therefore, would not be required to make any purchases from the defendant. A demand so weak that plaintiff's sales would be of little consequence would not change the situation. Its liability in that case, assuming its existence, notwithstanding other conclusions, would be so limited as to be entitled to little, if any, weight in considering this question.

Application of Authorities.

The precise question involved in this case has been heretofore decided. One of the leading cases upon the subject is the case of

Crane v. Crane, 105 Fed. 869,

which was a case decided in 1901 by the United States Circuit Court of Appeals of the Seventh Circuit. In that case damages were claimed for the breach of a contract by the seller whereunder he had agreed to furnish to the buyer all of the dock oak lumber which the buyer would require for his trade in the Chicago market during a fixed period at certain stipulated prices. The court in that case recognized and very clearly delineated the distinction which exists between a contract for articles intended for *consumption* and a contract covering articles intended for *resale*. As to the former the court, per Judge Grosscup, states:

> "It is within legal competency for one to bind himself to furnish another with such supplies as may be needed during some certain period for some certain business or manufacture; or with such commodities as the purchaser has already

bound himself to furnish another. Reasonable prevision in business requires that such contracts, though more or less indefinite, should be upheld. Thus a foundry may purchase all the coal needed for the season; or a furnace company its requirements in the way of iron; or a hotel its necessary supply of ice. Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; Railway Co. v. Witham, L. R. 9 C. P. 16; Smith v. Morse, 20 La. Ann. 220. So, too, a dealer in coal in any given locality may contract for such coal as he may need to fulfil his existing contracts, regardless of whether delivery by him to his customers is to be immediate or in the future. Shipman v. Mining Co., 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1051. In all these cases, contracts looking towards the future, and embodying subject-matter necessarily indefinite in quantity, have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are, within certain limits, ascertainable by the vendor. He is thus enabled to make reasonably accurate calculation of the extent of his obligation. Then, too, the purchase is only an incident of the vendee's business. Presumably the business will go on irrespective of a rise or fall in the prices of subsidiary supplies. There thus remains to the vendee little or no temptation, on account of the rise or fall in prices, to greatly enlarge or diminish the quantity of his orders."

Drawing its distinction between the two classes of contracts still further and contrasting one with the other, the court says further, at page 872 of its opinion:

> "The contracts brought to our attention have no such standard of approximate certainty, and no such safeguard against opportunity to impose upon the vendor. Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error and such customers as usually come to a merchant. Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also the quantum of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued.
>
> "On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—in a situa-

tion to either go on, or to discontinue, as such interest develops."

See also:

American Cotton Oil Co. v. Kirk (C. C. A.), 68 Fed. 791;

Tarbox v. Gotcian, 20 Minn. 139;

McIntyre etc. Co. v. Jackson Lbr. Co. (Ala.), 51 So. 767;

Hugens v. Southwest etc. Co. (Ga.), 48 S. E. 933;

Higbee v. Rust (Ill.), 103 Am. St. Rep. 204;

Walker etc. Co. v. Swift & Co., 200 Fed. 529, 43 L. R. A. (N. S.) 730;

Krause v. Greenfield (Ore.), 123 Pac. 392;

Plumb v. Hallaver, 130 Ny. Suppl. 147, 145 App. Div. 20.

The case of

Cold Blast etc. Co. v. Kansas City etc. Co., 114 Fed. 77,

decided by the Circuit Court of Appeals of the Eighth Circuit in 1902, is likewise of value as authority in this case.

This case is relied upon by counsel for plaintiff in error; but it will be found upon examination to support the principles of law relied upon by the defendant rather than those urged by the plaintiff. That court decides that "if the quantity is ascertainable otherwise with reasonable certainty," such a contract may be sustained. Its statement is:

"An accepted offer to furnish or deliver such articles of personal property as shall be needed,

> required, or consumed *by the established business* of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer." (Italics ours.)

The court, unfortunately, does not throw any light upon what an "established business" should be held to be. The question naturally is not whether the owner's business should have been in operation for a longer period of time than that of another, nor because, forsooth, his business has greater volume than that of another. The only reason for the injection of this element is that the line of demarkation may be drawn between valid and invalid contracts. This is evident from the court's statement on page 80 of its intention:

> "The line of demarkation between valid and invalid contracts here runs between the requirements of machinery, or of an established business, and the wants, desires, or requirements of the tentative vendee; and that because the former are either reasonably certain, or may be made so by the evidence, while the latter are conditioned by the will of the tentative vendee alone, and are both uncertain and capable of infinite variation."

A rather skillful attempt was made in behalf of the plaintiff in the case at bar to bring itself within the letter of this doctrine, in that an especial allegation is to be found in the complaint that the plaintiff has for many years been engaged in the wholesale grocery

business and that at the time of the execution of the agreement involved herein, it had many thousands of customers and that much of its business consisted of the dealing in and selling at wholesale of sugar in bag lots, and so on.

As stated elsewhere in this brief, plaintiff has confused the shadow with the substance, relying upon a word here or a phrase there used by this court or that in dealing with this subject, in an effort to make the law fit its case. It is reckoning, however, without the spirit of the law. The sole and only reason for the mention of an *established business* in any of the decisions is to require a showing to be made, precedent to the upholding of any contract of this type, that the quantity of the requirements of the purchaser were capable of reasonably accurate ascertainment at the time of the execution of the contract. If that is true, we submit that it makes no difference whether the business were established for only two hours and of no appreciable volume. The requirements of a factory just commencing its business but having unfilled orders to a certain and definite amount for coal for the operation of that factory for a specified period could be said to be capable of reasonably accurate ascertainment, notwithstanding not one single wheel in all of its machinery had ever been turned for the manufacture of its products. On the other hand, a merchandise broker, though he may have been in business for over fifty years, and famed and known throughout the length and breadth of the land, cannot be said to have an established business within the meaning of this doctrine for the simple and obvious reason that as his

requirements of a given article are exclusively for resale, and as his ability to resell the same depends exclusively upon the demand therefor, he cannot know what quantity he will be able to resell, and therefore require during a fixed future period. This, as has been elsewhere pointed out in this brief, is the case presented by this appeal.

Granting, for the purposes of this argument, that the plaintiff's business is of great volume and wide fame and that it has been long established, it, nevertheless, is not of that *nature* which enables its owners to look into the future and determine with reasonable or any accuracy what quantity of any specified article will be required. Requirement in this case means *requirement for resale.*

This principle is everywhere recognized. Counsel has quoted an excerpt from the 6th volume of R. C. L., the quotation being taken from paragraph 61 of the topic of Contracts at page 647, which paragraph commences as follows:

> "Whether a contract under which the amount or quantity is not stated specifically is enforcible seems to depend on whether such amount is ascertainable. When it is impossible to ascertain the amount or quantity the contract cannot be enforced. * * *"

In this same work, at page 689, it is stated:

> "Some times it is difficult to determine whether under the terms of a particular contract both parties are bound, whether the doctrine of mutuality is applicable to such a case depends on the interpretation of the contract. Contracts to

> furnish such material as one may need in his business for a specified time are, by the weight of authority, held mutual and binding upon the parties, where the *nature* of the purchaser's business is such as to make the quantity of the article he will need subject to a *reasonably accurate estimate.*" (Italics ours.)

As this work has already received due praise from counsel for plaintiff in error, these quotations will be submitted without further comment.

This work, as well as a note in volume "11" of L. R. A. (N. S.), at page 713, were rather prominently relied upon by counsel for plaintiff, as showing the modern tendency of the law. If modernity is all that is desired, we might call attention to a later note to be found in volume 43 L. R. A. (N. S.), at page 730, which refers to the note above mentioned in volume 11, and states:

> "As shown in the note referred to, the contracts to furnish such material as one may need in his business for a specified time are, by the weight of authority, held mutual and binding upon the parties, where the *nature* of the purchaser's business is such as to make the quantity of the article he will need subject to a reasonably accurate estimate." (Italics ours.)

Distinguishment of Cases

Plaintiff in error has cited a great many cases in its brief. Every one of these cases is readily distinguishable from the case at bar. For the most part, they are cases which involve a contract for requirements

in a business whose nature is such as to make the quantity of the needed article subject to a reasonably accurate estimate. For instance, in the case of

Lima Locomotive etc. Co. v. National Steel Casting Co., 155 Fed. 77, 11 L. R. S. (N. S.) 713,

the purchaser was a manufacturer and the articles purchased were steel castings needed in the conduct of the business of the purchaser, to-wit, that of manufacturing locomotives and machinery.

In the case of Marx v. American Malting Co., 169 Fed. 582, the purchaser was a brewing company and the article purchased was malt needed for the manufacture of the brewing company's product.

In the case of

Manhattan Oil Co. v. Richardson, 113 Fed. 923,

the purchaser was a manufacturer of lubricating grease and compounded oils and the articles purchased were parafine and asphalt oils needed by the purchaser in the manufacture of its products.

In all of these cases, the nature of the business was such as to enable the purchaser to make a reasonably accurate estimate of its requirements.

It is not necessary to comment upon all of the cases relied upon by the plaintiff in error. The following are of import similar to those above mentioned:

Golden Cycle Mfg. Co. v. Rapson etc. Co., 188 Fed. 179;

Sterling Coal Co. v. Silver Springs, 162 Fed. 848;

Klipstein v. Allen, 123 Fed. 992;
Loudenback Fertilizer Co. v. Rennessee Phosphate Co., 121 Fed. 298;
Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142.

The case of Ramey Lumber Co. v. Shroeder Lumber Co., C. C. A. 7th Circuit, 237 Fed. 39, is clearly distinguishable from the case at bar. In that case it appeared that the seller agreed to sell to the buyer all of the lumber of certain grades which the seller should manufacture or own during the season, and that prior to the time the contract was entered into the seller had notified the buyer of approximately the amount of lumber which it would manufacture and the amount which it would otherwise acquire. The buyer refused to accept certain shipments and the suit was for the recovery of the difference between the contract price of the particular shipments and the amount which the seller actually received therefor. The case is distinguishable for another and further reason. The seller agreed to sell and the buyer agreed to receive and pay for the specified lumber. The seller, under the contract, expressly deprived itself of the right to sell to anyone other than to the buyer. Any and all lumber of the particular type which the seller might manufacture or own during the entire season was required by the contract to be sold and shipped to the buyer. This deprivation of its right to sell to whomever it pleased was considered by the court to be a sufficient consideration for the purchaser's agreement to receive and pay for such lumber. Whatever might be said concerning this case, the fact remains that at the time

the contract was executed the seller owned a large supply of lumber and was in process of manufacturing an additional supply thereof, and had valid contracts for the acquirement of still further supplies thereof. Of this, the buyer was aware. As to this amount, the contract was undoubtedly binding as it was capable of accurate ascertainment. The amount shipped was very considerably less than this. Hence the conclusion reached by the court was undoubtedly correct, although its reasoning may be subject to some criticism if it was intended to hold that a promise to sell and deliver an indefinite and uncertain supply of lumber or other personal property was a valuable consideration for and would support and render valid a contract to accept and receive the same when the amount thereof was not reasonably susceptible of accurate ascertainment. We do not believe that the statement of the court "Inasmuch as it gives a valuable consideration for this right," found on page 44 of the volume aforementioned, was intended to refer solely to this promise. We prefer to believe that the court's reasoning was that the right to buy heavily or lightly, as the market permitted, and to require the buyer to accept the same, was in nature similar to the right which an option holder acquires. The courts have held that any consideration, however small, will support such a contract. A consideration of one dollar was recited in the contract in the case aforementioned. The consideration therefor mentioned by the court could very well be the consideration last above mentioned.

The case of Minnesota Lumber Company v. Whitebreast Coal Company, 160 Ill. 85, is clearly distinguishable. The contract therein involved provided for the purchase and sale of the requirements of coal of the Minnesota Lumber Company "engaged in the purchase, *use* and sale of coal." As stated by the court below in its opinion in the case at bar:

> "Aside from the fact that the purchaser in that case not only expected to sell coal, but to use it as well, the point considered herein and determined adversely to plaintiff's contention in Crane v. Crane, *supra,* was not made or considered therein. In addition, the conclusion of the court with respect to this branch of the case is based entirely upon the cases of National Furnace Co. v. Keystone Manufacturing Co., 110 Ill. 427, and Smith v. Morse, 20 La. Ann. 220, both of which had to do with circumstances similar to those in the cases cited by plaintiff, and in which the requirements were for an established business other than that of the sale of the precise commodity in question. The same situation existed in Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227. The only authority therein cited in support of the conclusion reached was the National Furnace Company case, which was not applicable under the circumstances shown. The conclusion in the Circuit Court of Appeals of the Seventh Circuit in the Crane case, hereinabove referred to, finds support in my judgment, in A. Santaella Co. v. Otto F. Lange & Co., 155 Fed. 719, 84 C. C. A. 145; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, and Higbee v.

Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204."

The case of Bartlett Springs Company v. Standard Box Co., 16 Cal. App. 671, was apparently a case between the box manufacturer as seller, and some springs company as purchaser, and involved a contract for boxes to be consumed rather than resold. Under those conditions, of course, this case would be readily distinguishable on the ground that the requirements of the consumer were capable of reasonably accurate estimate.

In the case of Myer Dental Mfg. Co. v. Smith, 237 Fed. 563, it appeared that the contract provided for the sale and purchase of at least $10,000.00 worth of appliances for the first year and an increased amount each year thereafter during the term of said contract. The seller cancelled the contract on account of the failure of the purchaser to meet the minimum. The buyer brought suit to enjoin the seller from enforcing the cancellation. The seller alleged that the contract was void for want of mutuality and also that it was subject to cancellation on account of the nonperformance of the buyer's obligations. The court held this latter to be true and only dealt with the former question in the following language:

"Defendant contends, first, that the contract of May 7, 1913, is unilateral, and for that reason unenforceable in law or equity. This contention, in our opinion, is untenable. The covenants of the contract conferring rights and imposing obligations upon the respective parties afforded ample

consideration for each other, and clearly validated the contract so far as this contention is concerned."

The net effect of this decision may be said to be that the obligation of the buyer to purchase and pay for a definite minimum is not only sufficient consideration for the obligation of the buyer to sell that minimum, but is also a sufficient consideration for the agreement of the seller to supply such additional excess as the buyer might order.

It may be seen that, as the result reached by the court in that case was the same as it would have been if it had decided this point otherwise, the court did not give this point very deep consideration. Therefore, this case is of no great value as authority upon this point.

The case of Connley Camera Company v. Multiscope Film Company, 216 Fed. 892, is similar to the case last above mentioned in that the contract was supported by the additional consideration that the purchaser in the same contract, and as a part of the consideration thereof, sold certain patents to the seller and the seller of the cameras gave to said purchaser an option at a fixed price to buy cameras. The comment made upon the previous case is applicable to this. In none of these cases was there raised the question raised in this case. At least, the courts in their opinions do not discuss the precise question. The only thing apparently considered as of importance is whether there was a consideration for the contract.

In addition to these cases, counsel for plaintiff in error have cited in their briefs the cases of Grand Prairie Gravel Co. v. Wills Co. (Tex.), 118 S. W. 680, and Western Maccaroni Co. v. Fiore (Utah), 151 Pac. 984. These cases are of similar import to those aforementioned. The court considers the question of consideration and holds the contracts to be valid.

We most earnestly and deferentially submit that there is neither sufficiency nor value in a promise to buy goods which may vary in quantity from nothing to a tremendous volume.

While it is true that the contract reads that the plaintiff "buys August requirements bags fine granulated beet sugar," etc., the court will observe that it is entirely silent as to any definition of the term "August requirements" and contains nothing whatsoever to indicate any method by which its meaning could be made sufficiently definite and certain in any action which the defendant might bring to enforce its rights or recover damages in case of an alleged breach by plaintiff. If the promise to buy is not sufficiently definite and certain to support a cause of action for damages for breach thereof it has no validity and cannot be said to have any value whatever to furnish the consideration for a corresponding promise on the part of defendant. Each contract of this character must, of course, be considered according to its own language, as well as the surrounding circumstances under which it is made. We are not aided by any appropriate allegations in the complaint to indicate what was meant by the parties in using the term "August requirements." In the case

of a consumer having an established business within the meaning of the cases there would be less difficulty in ascertaining the meaning of the term if it could be shown that a fixed quantity of the commodity would be used during a particular period in the regular course of business. The quantity *consumed or required for consumption* would be the measure. But what does the term mean in the business of a broker or dealer? Standing as it does in this record it is indeed vague, uncertain, indefinite and unintelligible. There are so many perplexing variations of meaning possible that if the situations were reversed and this defendant were suing for damages for a breach by plaintiff it would be impossible to frame a complaint which would not afford the purchaser an opportunity of escape under one or the other of the various possible meanings. For instance:

It might mean the amount of sugar which the plaintiff would *order* during August, whether for delivery during that month or thereafter, or whether to fill orders taken prior to August or during August.

It might mean the amount of sugar which plaintiff would require during August to maintain its reserve stock.

It might be limited to the amount of sugar which plaintiff would be required to deliver to its customers during August in filling orders taken prior thereto.

Or it might be limited to the quantity of sugar required to be delivered during August in filling orders taken during that month.

It might mean the amount of sugar which plaintiff

would find it necessary to purchase during August to fill orders taken that month and deliverable later.

These are not idle speculations, but go to the very vitals of the case, because if a promise to buy is not sufficiently definite and certain to support a cause of action for its breach it is of absolutely no value to the party relying thereon.

There was nothing in the situation to obligate the plaintiff either to buy or sell any sugar during the month of August. If the market were against plaintiff it could readily have declined to sell any of its customers this particular commodity; it could have purchased during July such quantity of sugar as that none would be required during August. It could have postponed the purchase until after the month of August all sugar which otherwise might be purchased during that month for future delivery; or it could have evaded any obligation because of the vagueness of the contract on any one of numerous other theories. It is inconceivable that plaintiff would require any sugar during August if to do so meant the solicitation or acceptance of orders for the sale thereof during that month with a loss on each bag sold. It did not obligate itself to purchase the same quantity which it may have purchased during the preceding August or during any other month. There was nothing in the contract to prevent plaintiff from laying in a stock in July sufficient to enable it to fill orders for the balance of the year or any other length of time. It did not obligate itself to purchase during August what its customers would require it to deliver during that month. It did not

agree to purchase during August the quantity which might be required to fill orders taken during July. It did not agree to purchase from defendant during August what its customers might require for delivery during that month. The contract relates only to plaintiff's own requirements. The defendant would be utterly unable under such contract to sustain an allegation that the purchaser "required" any sugar whatsoever if plaintiff should choose not to require it. Plaintiff's promise meant nothing more than that it would buy sugar from the defendant if it chose to do so.

In their argument plaintiff's counsel lay great stress upon the fact that plaintiff agreed to purchase its sugar during the month of August, 1914, exclusively from the defendant. We submit that this contention is not supported by the record. There is no express agreement to that effect. And there can be no implied agreement under the circumstances, for the contract is equally as vague and uncertain for the purpose of supporting an implied agreement as for any other purpose.

It is true that there is an allegation to the effect that the defendant named a lower price in consideration of the plaintiff's agreeing to buy exclusively from the defendant. If this is the allegation relied upon, it is not definite or certain enough to be considered. It is not an allegation that the plaintiff did in fact so agree. The written contract does not show that it did, and there is no allegation in the complaint that any other contract or agreement was entered into. The allegation, therefore, cannot be accepted as anything but a

conclusion of law from the contract declared upon. There is in fact nothing in the complaint to show that the plaintiff agreed to anything. It simply bought its August requirements. It did not even agree that there would be any requirements.

Point No. 3.

The Complaint Is Void, Uncertain, Ambiguous and Unintelligible.

We have already indicated the number of the points of indefiniteness and uncertainty which render the complaint demurrable. We do not believe any extended discussion is necessary under this head. We will simply set forth these points with very little, if any, comment.

(1) The complaint sets up a contract which provides that plaintiff buys and defendant sells "August requirements" of sugar. There is no allegation to help out the contract or to aid the court in determining that any facts existed upon which to predicate a finding that the "August requirements" were capable of definite ascertainment. We have already indicated in a preceding paragraph the particulars in which the contract is obnoxious in this respect and the necessity for some showing greater than has been made to enable the court to say that plaintiff was under any obligation whatsoever to buy.

Each one of the various contingencies suggested is vitally different from each of the others and involves an entirely different theory upon which to determine quantity. The quantity which defendant was obligated to sell is necessarily the most important feature of the

contract. The flexibility of the term, therefore, demands that the contract be supported by such allegations as would enable the court to determine what the contracting parties had in mind when the contract was made as the *measure* of the August requirements. Apparently the plaintiff did not consider that feature of the contract as of sufficient importance at the time it was made to necessitate the insertion therein of a definite amount. If there were other elements in the situation from which the court could interpret the meaning of the term, appropriate allegations in the complaint are necessary to supply the deficiencies in the contract and to enable the defendant to meet by answer such theory as the plaintiff might adopt.

The complaint is therefore fatally defective by reason of the absence of such allegations and the uncertainty of the entire complaint in that respect.

(2) It is alleged in the complaint that the price fixed in this contract was lower than the market price, and that this price was agreed to by the defendant in consideration of the plaintiff agreeing to buy exclusively from the defendant. This has already been discussed under a previous heading and nothing is necessary to be added to what was there said. The complaint is, therefore, uncertain, ambiguous and unintelligible in that it does not state whether this was actually agreed to between the parties separate and apart from the written contract declared upon. In the absence of such a showing, it can only be considered as a conclusion of the pleader that the written contract has that legal effect.

(3) It does not appear from the complaint when the plaintiff bought in open market. Paragraph XI of the complaint attempts to show wherein the plaintiff was damaged. The paragraph should be referred to at this point and for that reason we are copying the same:

"That by reason of the refusal of the defendant to deliver said four thousand two hundred (4200) bags of sugar and by reason of the non-delivery thereof, the plaintiff lost its profits on the re-sale thereof, and was compelled to and did buy in the open market, at the prevailing market price, fine granulated beet sugar at a price in excess of said contract price, amounting to three and 10/100 dollars ($3.10) per bag, and that it did purchase in the open market at said advanced price four thousand two hundred (4200) bags of said sugar for delivery to its said customers."

It will be noted that the allegation simply is that plaintiff bought in open market. We believe that it is necessary for the complaint to be more certain in this respect. The plaintiff could prove under this allegation that its said purchases were made in September, October or November. The complaint was not filed until December, 1914.

(4) It does not appear whether the said purchases so made by the plaintiff were for August delivery. If the purchases were made to fulfill the September requirements of the plaintiff, the same have no bearing upon the case at bar which relates exclusively to August requirements.

(5) There is no showing that the said purchases so made by the plaintiff, or any thereof, were ever actually delivered by the plaintiff. The allegation simply is that the purchases were made and delivered to the purchaser's customers. It is just as uncertain in this respect as the words "August requirements" are uncertain. The business of the plaintiff is that of a seller. It cannot charge the defendant with the alleged difference in price for sugar which it did not sell and deliver, but which it retained unsold in its warehouse.

(6) There is no allegation to show that the purchases so made by the plaintiff were in fact made for the purpose of filling orders received from its customers during the month of August, and that the same was actually delivered to those customers in satisfaction of those orders.

(7) There is nothing in the complaint to show when the plaintiff accepted and received orders from its customers based upon the contract price of sugar specified in the contract declared upon. This should be rendered more definite and certain. Under the complaint, as it is now, it can be assumed that these orders were not taken until the price of sugar had advanced. Under the rule that a pleading is to be construed against, rather than favorably to, the pleader, this assumption must be seriously taken. If this is true, there could be no better evidence of the want of good faith on the part of the plaintiff and, therefore, of the absence of any intention on its part to be bound under the contract.

Conclusion.

The foregoing are only a few of the particulars wherein the complaint is uncertain, ambiguous or unintelligible. All of these particulars were specified in the demurrer to the plaintiff's second amended complaint. The plaintiff, therefore, had ample notice of what was regarded by the defendant as being uncertain, ambiguous or unintelligible. The demurrer was sustained by the court. In its order sustaining the same, it expressly granted to the plaintiff leave to again amend its complaint. The plaintiff elected not to do this and served notice of this election. The plaintiff, therefore, had ample opportunity to correct these defects. It did not deign to do so. The complaint in these respects has not been corrected. In considering the matter presented on this appeal, the court must, before holding the complaint sufficient, pass upon all of the grounds of the demurrer. In view of plaintiff's refusal to amend, it must, we submit, be inferred and assumed that plaintiff was unable to cure these deficiencies and that the complaint states all facts which the plaintiff was able to state. We submit that the demurrer was properly sustained and that, therefore, the judgment of the lower court should be affirmed.

Respectfully submitted,

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